Nos. 80-1679 and 80-1746

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In the Supreme Court of the United States

OCTOBER TERM, 1980

ANTHONY M. SCOTTO, PETITIONER

v.

UNITED STATES OF AMERICA

ANTHONY ANASTASIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court properly instructed the jury on the provision of the Racketeer Influenced and Corrupt Organizations Act (RICO) prohibiting the conduct of the affairs of an enterprise "through" a pattern of racketeering activity (No. 80-1679).

2. Whether the district court properly instructed the jury on the intent element of RICO (No. 80-1679).

3. Whether violations of the Taft-Hartley Act, 29 U.S.C. 186(a)(1) and (b)(1), can be a racketeering activity under RICO (No. 80-1746).

4. Whether, in a single proceeding, a defendant can be separately convicted and punished for both a substantive RICO offense and the underlying acts of racketeering (No. 80-1679).

5. Whether there was reversible error in the joinder of petitioner Anastasio (No. 80-1746).

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v.

UNITED STATES OF AMERICA

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-18a)[1] is reported at 641 F. 2d 47.

JURISDICTION

The judgment of the court of appeals was entered on September 2, 1980. Petitions for rehearing were denied on

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[1]Unless otherwise indicated, "Pet. App." refers to the appendix to the petition in No. 80-1679.

March 6, 1981 (80-1679 Pet. App. 19a; 80-1746 Pet. App. 19a-20a). The petition for a writ of certiorari in No. 80-1679 was filed on April 6, 1981; the petition in No. 80-1746 was filed on April 17, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following an eight-week jury trial in the United States District Court for the Southern District of New York, petitioners were convicted on one count of conspiracy to participate in the affairs of the International Longshoremen's Association (ILA) through a pattern of racketeering activity, in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO) (18 U.S.C. 1962(d)). Petitioner Scotto was also convicted on one substantive count of participating in the affairs of the ILA through a pattern of racketeering activity, in violation of RICO (18 U.S.C. 1962(c)). In addition to the RICO counts, petitioners were convicted on 41 counts charging the demand and receipt of unlawful labor payments, in violation of the Taft-Hartley Act (29 U.S.C. 186(b)), and the failure to report and pay federal income taxes on those payments, in violation of 26 U.S.C. 7201 and 7206(1).[2] Scotto was sentenced to a total of five years' imprisonment, to be followed by five years' probation, and was fined $75,000.[3] Anastasio was sentenced to a total of two years' imprisonment, to be followed by five

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[2]Thirty-five counts involved the Taft-Hartley violations, of which 24 were against Scotto, eight were against Anastasio, and three were against both petitioners. The remaining six counts charged the tax offenses, of which four pertained to Scotto and two to Anastasio.

[3]Scotto was sentenced to five years' imprisonment and a fine of $25,000 on the substantive RICO count; a suspended sentence, a consecutive term of five years' probation, and a concurrent fine of $25,000 on the RICO conspiracy count; a concurrent term of five years' imprisonment and five years' probation, and a fine of $50,000, on the Taft-Hartley counts; and a concurrent term of three years' imprisonment on the tax counts.

years' probation, and was fined $5,000.[4] The court of appeals affirmed (P . App. 1a-18a).

The evidence at trial, the sufficiency of which is not challenged (Pet. App. 2a), is summarized in the opinion of the court of appeals (*id.* at 4a-5a). In brief, it showed that between 1975 and 1979 Scotto was the president of ILA Local 1814 in Brooklyn and the vice-president for legislative affairs of the national ILA. From 1975 through April 1978, Anastasio was the secretary-treasurer of an affiliated ILA local in Brooklyn, and he later became executive vice-president of ILA Local 1814; in addition, Anastasio was a national organizer for the ILA. In the period 1975-1979, Scotto and Anastasio corruptly used their positions as unions officials to obtain more than 40 illegal labor payoffs exceeding $300,000 from at least six separate waterfront businesses employing ILA labor. These payments were made by the employers to secure petitioners' assistance in such areas as attracting new business, keeping current customers from competitors, and reducing inaccurate worker's compensation claims filed by members of ILA Local 1814.

ARGUMENT

1. Petitioner Scotto contends (Pet. 10-18) that RICO, which prohibits the conduct of the affairs of an enterprise "through" a pattern of racketeering activity (18 U.S.C. 1962(c)), is violated only if the acts of racketeering "advance * * * the enterprise's affairs" (Pet. 15).[5] On this basis he

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[4]Anastasio was sentenced to two years' imprisonment and a fine of $5,000 on the Taft-Hartley counts; a suspended sentence and five years' probation on the tax counts; and a concurrent term of two years' imprisonment and a concurrent fine of $5,000 on the RICO conspiracy count.

[5]Petitioner's contention is confined to cases involving "legitimate" enterprises (see Pet. 15). Compare *United States* v. *Turkette*, No. 80-808 (argued Apr. 27, 1981).

challenges the adequacy of the district court's instructions to the jury (Pet. i).[6]

We note at the outset that it is doubtful whether this argument was properly preserved in the lower courts.[7] At trial, petitioner did not seek an instruction based on his current theory of RICO, but rather submitted a request framed in terms of the relation between the acts of racketeering and "the operation or management of the enterprise" or "the affairs of the [enterprise] in its essential functions" (Pet. App. 8a-9a n.3). Petitioner pressed the same position in the court of appeals. In these circumstances, we do not believe that the interpretation petitioner now asserts is properly before the Court. See Fed. R. Crim. P. 30; *Henderson* v. *Kibbe*, 431 U.S. 145, 154-156 (1977); *United States* v. *Park*, 421 U.S. 658, 676 (1975).

In any event, petitioner's contention is without merit. Petitioner has cited nothing in the text or history of RICO to support his narrow construction that the enterprise must be the beneficiary rather than the victim of the racketeering activity. To the contrary, for the reasons stated by the court of appeals (Pet. App. 10a-11a), and in light of Congress' broad resolve "to seek the eradication of organized crime in the United States" (Pub. L. No. 91-452, 84 Stat. 923, 18 U.S.C. 1961 note) and its directive that "[t]he provisions of

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[6]Petitioner does not otherwise challenge the instructions in this regard, which adequately explained the requisite nexus between the acts of racketeering and the enterprise by charging the jury that a verdict of guilty could be returned only if petitioner engaged in a pattern of racketeering activity "while and as part of conducting or participating either directly or indirectly in the conduct of the affairs of the enterprise. * * * [In order to convict, you must] find that the acts were committed by [petitioner] or caused to be committed by him in the conduct of, or his participation in, the affairs of the enterprise" (Pet. App. 9a).

[7]The court of appeals assumed but did not decide that petitioner preserved the issue for review (Pet. App. 8a-9a).

[RICO] shall be liberally construed to effectuate its remedial purposes" (Pub. L. No. 91-452, Section 904(a), 84 Stat. 947, 18 U.S.C. 1961 note), petitioner's argument is unfounded. Moreover, numerous convictions have been obtained and upheld in cases in which the racketeering activity did not advance or facilitate the enterprise. See, *e.g.*, *United States* v. *Karas*, 624 F. 2d 500 (4th Cir. 1980), cert. denied, Nos. 80-486, 80-490 (Jan. 12, 1981) (bribery of local prosecutors); *United States* v. *Weisman*, 624 F. 2d 1118 (2d Cir. 1980), cert. denied, No. 80-62 (Oct. 6, 1980) (skimming of profits and bankruptcy fraud involving theater); *United States* v. *Swiderski*, 593 F. 2d 1246 (D.C. Cir. 1978), cert. denied, 441 U.S. 933 (1979) (restaurant used as a front for a narcotics business); *United States* v. *Rubin*, 559 F. 2d 975, 989-990 (5th Cir. 1977), vacated and remanded on other grounds, 439 U.S. 810 (1978) (embezzlement of union funds).

The legislative history of RICO confirms that the enterprise need not benefit from the acts of racketeering in order to come within the statute. For example, the Senate Report explained that RICO would apply where

> organized crime has moved into legitimate unions. Control of labor supply through control of unions can *prevent the unionization of some industries* or can *guarantee sweetheart contracts in others.* It provides the opportunity for *theft from union funds*, extortion through the threat of economic pressure, and the profit to be gained from the *manipulation of welfare and pension funds and insurance contracts.*

S. Rep. No. 91-617, 91st Cong., 1st Sess. 78 (1969) (emphasis added; footnote omitted). See also *id.* at 77 ("[a]fter takeover, defaulted loans are often liquidated by professional arsonists burning the business and then collecting the insurance or by various bankruptcy fraud techniques"). In illustrating the application of RICO, Senator McClellan,

the principal sponsor of the statute, similarly observed that "[l]abor unions are infiltrated, and then labor peace is sold to businesses. *This does not inure to the benefit of the workingman.* To the contrary, for example, * * * [organized crime] recently required payments from a contractor so that nonunion men could work at lower wages on a project. In business, the mob bleeds a firm of assets, then takes bankruptcy." 116 Cong. Rec. 18912, 18939 (1970). Senator McClellan also noted that RICO would extend to situations where "[b]uilding contractors pay tribute for the privilege of using non-union labor, while labor unions infiltrated by organized crime raise no objection,"or where a "corporation is bled of its assets, goods obtained by the corporation on credit are sold for a quick profit, and then the corporation is forced into bankruptcy while the criminals who infiltrated it disappear." *Organized Crime Control: Hearings S. 30, and related proposals Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 91st Cong., 2d Sess. 95, 106 (1970). This Congressional understanding of the scope of RICO is flatly inconsistent with the reading of the statute urged by petitioner.

Nor do the cases that petitioner cites (Pet. 15-17) demonstrate a conflict among the circuits on this issue. Petitioner relies principally upon *United States* v. *Webster*, 639 F. 2d 174 (4th Cir. 1981). Apart from the factual distinctions between *Webster* and this case, we note that the panel in *Webster* has granted the government's petition for rehearing (App., *infra*, 1a-3a) and has set the case for reargument.[8] Accordingly, petitioner's reliance on *Webster* does not suggest the need for review by this Court at the present time.[9]

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[8]Reargument is currently scheduled for June 4, 1981.

[9]*United States* v. *Nerone*, 563 F. 2d 836 (7th Cir. 1977), cert. denied, 435 U.S. 951 (1978), also does not establish the existence of a conflict. Indeed, the Seventh Circuit in other decisions, both before and after *Nerone*, has affirmed convictions in which the interests of the enterprise

2. Scotto next contends (Pet. 18-21) that the court of appeals erroneously held he could be convicted of a RICO offense predicated on violations of 29 U.S.C. 186(a)(1) and (b)(1) without regard to *mens rea*. This assertion misconceives the record and opinion below. The district court instructed the jury that it could convict petitioner if it determined that he " 'acted wilfully and knowingly,' " that he " 'knew what he was doing and that he did it deliberately and voluntarily,' " that he acted " 'knowingly and deliberately with a criminal motive or purpose,' " and that he " 'was aware of the general unlawful nature of his act' " (Pet. App. 13a). The court also informed the jury that petitioner could be found guilty on the RICO conspiracy count only if he " 'participated in the conspiracy with a specific and criminal intent, that is, a purpose to violate the law' " (*id.* at 13a-14a). As the court of appeals noted (*id.* at 13a, 14a), any error in those instructions was unduly favorable to petitioner on the *mens rea* element, and his argument that he was convicted of a non-*mens rea* offense is entirely unsupportable.

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were not furthered by the pattern of racketeering activity. See, *e.g.*, *United States* v. *Grzywacz*, 603 F. 2d 682 (7th Cir. 1979), cert. denied, 446 U.S. 935 (1980) (bribery of police officers); *United States* v. *Kaye*, 556 F. 2d 855 (7th Cir.), cert. denied, 434 U.S. 921 (1977) (Taft-Hartley violations by union official). As the court explained in *Kaye* (556 F. 2d at 861), "defendant was conducting or participating in the affairs of Local 714 when he committed the acts for which he was charged. Defendant as chief steward conducted Local 714's affairs in appointing himself as union steward, and accepting payments as union steward from union contractors for services which were not rendered." Moreover, although the opinion is not entirely free from ambiguity, we read *Nerone* to hold merely that "[t]he government's case must fail because of a total want of proof of the connection between the racketeering activities and the affairs of [a trailer park constituting the enterprise]. Geographical juxtaposition of [the illegal gambling business and the trailer park where the gambling occurred] is insufficient" (563 F. 2d at 852). In view of the tenuous factual connection between the racketeering acts and the enterprise in *Nerone*, we think it plain that the decision in that case and the decision below create no conflict requiring this Court's review.

3. In a similar vein, petitioner Anastasio argues (Pet. 10-11) that violations of 29 U.S.C. 186(a)(1) and (b)(1) cannot serve as predicate acts of racketeering under RICO because they contain no *mens rea* element.[10]

This argument is without merit. 18 U.S.C. 1961(1)(C) unambiguously states without qualification that " 'racketeering activity' means * * * *any* act which is indictable under title 29, United States Code, section 186 * * *" (emphasis added). Anastasio has pointed to nothing in the RICO statute or legislative history to override this plain language.

Furthermore, contrary to the premise of petitioner's contention, 29 U.S.C. 186 is not a strict liability offense. Rather, the defendant must "willfully violate[]" the statute (29 U.S.C. 186(d)). See, *e.g., United States* v. *Kaye, supra*, 556 F. 2d at 863; *United States* v. *Pecora*, 484 F. 2d 1289 (3d Cir. 1973). The requisite intent is therefore the same general intent that is necessary for other predicate acts of racketeering. And, as noted above (see page 7, *supra*), the jury was instructed that petitioners could be convicted of RICO conspiracy based on the Section 186 violations only if they " 'participated in the conspiracy with a specific and criminal intent, that is, a purpose to violate the law.' " Accordingly, Anastasio was not found guilty of the RICO offense under a theory of strict liability without regard to his knowledge or intent. Compare, *e.g., United States* v. *Park, supra*; *United States* v. *Dotterweich*, 320 U.S. 277 (1943).

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[10]Because Anastasio received concurrent sentences on the Taft-Hartley and RICO counts (see page 3 note 4, *supra*), it is unnecessary to consider his challenge to the RICO count. See, *e.g., Andresen* v. *Maryland*, 427 U.S. 463, 469 n.4 (1976); *Barnes* v. *United States*, 412 U.S. 837, 848 & n.16 (1973).

4. Scotto contends (Pet. 21-24) that a defendant cannot be convicted and cumulatively punished for both a substantive RICO offense and the predicate acts of racketeering. In his view, the racketeering acts are lesser-included offenses within the substantive RICO offense, and thus the imposition of separate penalties is prohibited by the Double Jeopardy Clause.[11]

Petitioner's claim of impermissible cumulative punishments is unavailing on the facts of this case. Because petitioner's sentence on the substantive RICO conviction is concurrent with his aggregate sentence on the other counts (see page 2 note 3, *supra*), it cannot be said in any meaningful sense that the substantive RICO conviction has resulted in a cumulative penalty. Indeed, even if petitioner's argument were accepted, his total sentence would be unchanged. Moreover, the substantive RICO offense requires only two predicate acts of racketeering, and therefore the convictions and sentences on the numerous remaining predicate counts are unaffected by petitioner's argument and suffice to sustain his overall sentence.

At all events, petitioner's double-jeopardy contention was correctly rejected by the court below (Pet. App. 14a). The structure and purpose of the RICO statute clearly evidence Congress' intent to authorize cumulative sentences for the racketeering offenses and for the predicate acts of racketeering. See also Pub. L. No. 91-452, Section 904(b), 84 Stat. 947, 18 U.S.C. 1961 note; S. Rep. No. 91-617, 91st Cong., 1st Sess. 124 (1969). Where cumulative penalties are authorized by statute, the imposition of such penalties in a single sentencing proceeding following a single trial does

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[11] Petitioner does not, and reasonably could not, urge that the predicate Taft-Hartley violations are lesser-included offenses of the RICO conspiracy offense.

not violate the Double Jeopardy Clause (*Albernaz* v. *United States*, No. 79-1709 (Mar. 9, 1981), slip op. 10-11), and the courts of appeals have consistently sustained consecutive sentences for RICO offenses and the underlying racketeering acts. See *United States* v. *Dean*, No. 79-1919 (8th Cir. Apr. 17, 1981), slip op. 11 n. 14; *United States* v. *Morelli*, 643 F. 2d 402, 413 (6th Cir. 1981), petition for cert. pending, No. 80-1748 (filed Apr. 17, 1981); *United States* v. *Boylan*, 620 F. 2d 359, 361 (2d Cir. 1980), cert. denied, No 79-1882 (Oct. 6, 1980); *United States* v. *Aleman*, 609 F. 2d 298, 306-307 (7th Cir. 1979), cert. denied, 445 U.S. 946 (1980); *United States* v. *Solano*, 605 F. 2d 1141, 1145 (9th Cir. 1979), cert. denied, 444 U.S. 1020 (1980); *United States* v. *Rone*, 598 F. 2d 564, 571-572 (9th Cir. 1979), cert. denied, 445 U.S. 946 (1980).

5. Anastasio argues (Pet. 4-9) that there was misjoinder of the RICO conspiracy and related counts against both petitioners with the substantive RICO and related counts against Scotto alone.[12] First, for the reasons fully explained by the court of appeals (Pet. App. 16a-17a), petitioner at no time "moved to sever the substantive racketeering count and the Taft-Hartley counts against Scotto alone from the other counts charging Scotto and Anastasio together" (*id.* at 17a), and therefore this issue has not been properly preserved for review. Moreover, the challenged counts were part of the same series of transactions by which Scotto and Anastasio misused their union positions for personal gain; indeed, petitioners were jointly charged in certain of the Taft-Hartley counts and in the RICO conspiracy count, which incorporated the joint Taft-Hartley offenses as well as those involving Anastasio alone as " 'some of the means by which [petitioners] committed the offenses charged' "

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[12]Anastasio does not dispute that he and Scotto were correctly tried together on the counts pertaining to the RICO conspiracy charge.

(80-1746 Pet. App. 20a).[13] Finally, in light of the district court's repeated cautionary instructions to the jury that the evidence concerning the disputed counts was being admitted only against Scotto (Tr. 1225-1226, 2144, 2166, 2199, 3141, 5222, 6060), we do not believe that the inclusion of these counts at trial resulted in prejudice to Anastasio or compromised the ample evidence of his guilt on the counts against him.[14]

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1981

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[13]Of course, as Fed. R. Crim. P. 8(b) expressly provides, "all of the defendants need not be charged in each count."

[14]Contrary to the suggestion of Anastasio (Pet. 7), the misjoinder issue raised in this case is unrelated to the Rule 8 question now before the Court in *United States* v. *Turkette*, No. 80-808 (argued Apr. 27, 1981). Unlike the situation in *Turkette*, where the claim of misjoinder arose only from the invalidation by the court of appeals of the RICO conspiracy count that provided the basis for joinder in the district court, the essential counts against Anastasio have been sustained and are adequate to support a single trial of all counts in the indictment.

APPENDIX

UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT

No. 79-5204 (L)

United States of America, Appellee,

versus

Walter R. Webster, etc., Appellant.

No. 79-5240

United States of America, Appellee,

versus

Walter R. Webster, etc., Appellant.

No. 79-5241

United States of America, Appellee,

versus

Richard Adams, etc., Appellant.

No. 79-5242

United States of America, Appellee,

versus

Norma Thompson, Appellant.

No. 79-5243

United States of America, Appellee,

versus

Boysie Ash, Appellant.

No. 79-5244

United States of America, Appellee,

versus

Victoria Wills, Appellant.

No. 79-5245

United States of America, Appellee,

versus

John V. Christian, etc., Appellant.

No. 79-5246

United States of America, Appellee,

versus

Herbert Leon Johnson, etc., Appellant.

ORDER

Upon consideration of the petitions for rehearing with suggestion for rehearing en banc,

IT IS ORDERED that:

1. the suggestion for rehearing en banc is DENIED;

2. the government's motion for rehearing as to the proper interpretation of the RICO statute is GRANTED;

3. all motions for rehearing for other parties are DENIED.

Entered at the direction of Judge Murnaghan with the concurrence of Judge Winter and Judge Butzner.

For the Court

/s/ William K. Slate, II

CLERK

FILED
MAY 4, 1981
WILLIAM K. SLATE, II
CLERK